Volume 59
Issue 2 *Dickinson Law Review - Volume 59, 1954-1955*

1-1-1955

Recent Cases

RECENT CASES

CRIMINAL LAW — HOMICIDE — INSANITY DEFENSE — DEFINITION OF INSANITY — A MATTER OF FACT FOR JURY DETERMINATION

Until July, 1954, the federal courts of the District of Columbia had used both the *M'Naughten* test[1] and the "irresistible impulse" test[2] in order to determine whether a defendant was sane enough to be held responsible for his crimes. Under the *M'Naughten* test it was required that the defendant, in order to be found insane, must be under a defect of reason from a disease of the mind and as a result does not know the nature and quality of the criminal act or does not know that the act was wrong.[3] This has become known as the "right and wrong test".

It was not until 1929 that the "irresistible impulse" test was adopted in Smith v. United States.[4] Here it was required that the defendant be impelled to do the act as a result of an irresistible impulse which was caused by a diseased mind which left the defendant powerless to resist the impulse.

In *Durham v. United States,*[5] the United States Court of Appeals for the District of Columbia added an entirely new doctrine to the defense of insanity.[6] Recognizing the shortcomings of the two tests mentioned above, the court held:

> "The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire court since 1870. It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."

The court further stated:

> "We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."

Considering the New Hampshire rule which is mentioned in the Durham case, it is noted that this doctrine was first considered in the law by Justice Doe in a dissenting opinion in *Boardman v. Woodman,*[7] where he said:

> "If the jury were instructed that certain manifestations were symptoms of consumption, cholera, congestion, or poison, a verdict rendered in accordance with such instructions would be set aside, not because they were not correct, but because the question of their correctness was one of fact to be determined by the jury upon evidence. Experts may testify as to

---

1 U.S. v. Lee, 15 D.C. 489, 4 Mackey 489 (1886).
2 Smith v. United States, 59 App. D.C. 144, 36 F.2d 548 (1929).
3 10 Clark and Finelly 200 (1843).
4 See n. 2, supra.
5 —App. D.C.—, 214 F.2d 862 (1954).
6 In accord is —App. D.C.—, 214 F.2d 879 (1954).
7 47 N.H. 120 (1865).

the indications of mental disease, as they could not if such indications were a matter of law."[8]

Again he said in the same dissent:

"That cannot be a fact in law, which is not a fact in science; that cannot be health in law, which is disease in fact."[9]

This was the first expression of what a few years later became known as the New Hampshire rule. The rule was announced as such in the majority opinion by Justice Smith in *State v. Pike,*[10] which was an appeal of a murder case. It was stated as follows:

"The court instructed the jury 'that whether there is such a disease as dipsomania, and whether the defendant had that disease, and whether the killing of Brown was the product of such disease, were questions of fact for the jury.' "

The instruction was upheld by the court which said, "Whether there is such a disease is a question of science and fact, not of law." The doctrine was reiterated in *State v. Jones,*[11] where the court said:

". . . the verdict should be 'not guilty because of insanity,' if the killing was the offspring or product of mental disease in the defendant."

The rule made the definition of insanity a matter of fact to be determined by the jury. It took the definition from the hands of the judges so that tests such as the *M'Naughten* and "irresistible impulse" tests would not stand in the way of the application of scientific truths in the insanity defense. Under this test juries could apply the benefits of advanced technical knowledge in insanity without being burdened by such things as the outmoded test of the defendant being able to tell the difference between right and wrong. The New Hampshire doctrine cannot be called a test as such, but it is rather a rule of law which states that the jury shall be the sole judge as to what insanity is. The jury shall then go on to apply the facts of the case at bar to that definition in order to determine the criminal responsibility of the defendant. Justice Brazelton has done the same thing in the *Durham* case where it is stated:

". . . the jury is not required to depend upon arbitrarily selected symptoms, phases, or manifestations of the disease as criteria for determining the ultimate question of fact upon which the claim depends. . . . Testimony as to such symptoms, phases, or manifestations, with other relevant evidence, will go to the jury upon *ultimate questions of fact which it alone can finally determine.*" [Emphasis added.]

---

8 47 N.H. at 148 (1865).
9 47 N.H. at 150 (1865).
10 49 N.H. 399 (1896).
11 50 N.H. 369 (1871).

Here we see that the federal court has followed the New Hampshire court in leaving the definition of insanity to jury determination.

As a result of the New Hampshire rule there has been a complete dearth of appeal cases in the field of insanity as a defense to crimes in that state. The reason is simply that an appeal court will not review a jury's finding of fact, and, as pointed out above, the definition of insanity is a fact to be found by the jury. It would seem to follow that, in the District of Columbia, cases in which the insanity doctrine is invoked as a defense will not frequently be heard on appeal. There is one distinction, however, between the New Hampshire rule and the *Durham* rule. This is that the New Hampshire courts did not and still have not defined "mental disease" while the federal court has already defined "mental disease" and "mental defect".

It is true that these definitions seem loose and all inclusive and leave no room for judicial interpretation,[12] therefore, it would appear that the fate of the new federal rule will be the same as that of the New Hampshire rule.

The New Hampshire rule was to a limited extent the basis of a proposed model statute for an insanity defense.[13] The model statute, however, was later repudiated by the same group which had originally adopted it.[14] Several states have considered the rule, but apparently none have adopted it as it existed in New Hampshire.[15] In the *Durham* case, Justice Brazelton has recognized the inadequacy of the insanity tests which are prevalent in the United States today. One would gather, from reading the excellent study by Justice Brazelton in the *Durham* decision, that the best remedy for this inadequacy is the New Hampshire rule as devised by Justice Doe and a psychiatrist, Isaac Ray, in an early meeting of the scientific and legal minds.[16] After more than eighty years, another American jurisdiction has followed that lead. It is likely that other courts and legislatures will also follow it.

Carl F. Skinner
Member of the Middler Class

---

12 Certainly logic dictates that there is no course a "condition" might take other than "improving", "deteriorating", or doing neither of these. At the same time the three causation factors appear to include all possible sources of a "mental defect".

13 1 Hitchler, Criminal Law 144 (1939). See also Keedy, E., Insanity and Criminal Responsibility, 30 Harv. L. Rev. 535, for the text of the model statute.

14 Gleuck, Sheldon, Mental Disorder and Criminal Law, p. 456, 1927.

15 Weihofen, Henry, Insanity as a Defense in Criminal Law, p. 82, 1933.

16 For an interesting account of the work of these two men in relation to the present subject matter, see Reich, Louis E., The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease, 63 Yale L. J. 183.

CONSTITUTIONAL LAW — CONSTITUTION OF THE UNITED STATES — FIRST AND FOURTEENTH AMENDMENTS — PREVIOUS RESTRAINT OF FREE SPEECH — MOTION PICTURES — STATE BOARD OF CENSURE — ACT OF 15 MAY 1915, P.L. 534

For forty years movies have been subjected to censorship in Pennsylvania. Are the broad powers permitting this censorship about to be struck down?

In the recent case of *Hallmark Productions, Inc. v. The Pennsylvania State Board of Censors,*[1] a Philadelphia Common Pleas Court declared that the Act of Assembly[2] creating the machinery of motion picture censorship constituted a previous restraint[3] on the freedom of speech and as such offended the First and Fourteenth Amendments of the Federal Constitution. This decision reversed an order of the Censorship Board which had refused to permit the showing of the film "She Should Have Said No" on the grounds that such film was "indecent and immoral and in the opinion of the Board tended to debase and corrupt morals".[4] The case is now under appeal to the Pennsylvania Supreme Court.

"She Should Have Said No" depicted the life of a narcotics peddler and the methods by which he involved innocent persons in the sale and use of marijuana cigarettes. A young chorus girl, in an attempt to pursue her career successfully and to get necessary funds to send her brother through college, makes the acquaintance of this peddler and thereafter becomes a drug addict. The viewer is shown the methods employed in smuggling the contraband cigarettes into the city from rural areas, the manner of selling and transferring the illicit narcotics to the individual buyer and user and the methods by which the smoker may receive the maximum exhilartion from the narcotic in the cigarettes.

The judges of the common pleas court viewed this picture in its entirety and, after hearing the arguments, stated that, although "from a public point of view nothing but harm can result from the exhibition of this film",[5] they were compelled most reluctantly to remove the ban upon the exhibition in Pennsylvania

---

1 Hallmark Productions, Inc. v. Edna R. Carroll, John Clyde Fisher and Beatrice Z. Miller, as members of the Pennsylvania State Board of Censors, Philadelphia Court of Common Pleas No. 2, No. 9265 June Term, 1953, September 21, 1954.

2 Act of 15 May 1915, P. L. 534, as amended by the Act of 8 May 1929, P. L. 1655; 4 P.S. 43.

3 Previous restraint is to be distinguished from a proper exercise of the police power in restraining exhibitions of motion pictures after the initial showing if such exhibitions are held contrary to the public welfare. "In the first place the main purpose of such a constitutional provision (the First Amendment) is to prevent all such previous restraints upon publication. . . they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." Patterson v. Colorado, 205 U.S. 454, 51 L. Ed. 879 (1907).

4 See n. 1, supra. Article 6, provides: "Approvals by Board. The Board shall examine or supervise the examinations of all films, reels, or views, to be exhibited or used in Pennsylvania; and shall approve such films, reels, or views which are moral and proper; and shall disapprove such as are sacrilegious, obscene, indecent or immoral, or such as tend, in the judgment of the Board, to debase or corrupt morals. This section shall not apply to announcement or advertising slides or to films or reels containing current news events or happenings, commonly known as news reels, which are not in violation of the provisions of this section."

5 See n. 1, supra.

for the reason that the censorship statute offends the Federal Constitution as construed by the United States Supreme Court in *Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York*,[6] hereinafter referred to by its popular name, the *Miracle Case*. There the New York State Board of Regents rescinded a license for the showing of Roberto Rosselini's Italian film, "The Miracle", on the grounds that the picture was "sacrilegious" within the meaning of a New York statute requiring denial of a license if a film is "sacrilegious".[7] The United States Supreme Court reversed the New York Court of Appeals, which had upheld the order of the Board of Regents, and stated that the word "sacrilegious" was unconstitutionally vague and as such violated due process and constituted a previous restraint on freedom of speech. This *Miracle Case* expressly overruled *Mutual Film Corp. v. Industrial Commissioner of Ohio*,[8] decided in 1915, which held that motion pictures were an amusement and as such were not part of the press of the country or an organ of public opinion.

If the Pennsylvania Supreme Court follows its earlier decisions on this question, the constitutionality of this statute will be upheld. In 1915, in *Buffalo Branch, Mutual Film Corp. v. Breitinger*,[9] the Pennsylvania Supreme Court held that the *Act of* 1911[10] which provided for the appointment of a State Board of Censors to regulate the operation and exhibition of motion pictures, did not violate either the state Bill of Rights or the Fourteenth Amendment of the Federal Constitution. In this case the court refused to grant an injunction enjoining the Censor Board from banning the showing of certain films in Pennsylvania.[11] Pennsylvania courts later applied this doctrine to cases arising under the *Act of* 1915.[12] *In Re Goldwin Distributing Corporation*[13] held that the Censorship Board did not act arbitrarily in refusing to grant a license for the exhibition of the film "The Brand" on the grounds "that said reels tend, . . . to debase and corrupt the

6 343 U.S. 495, 96 L. Ed. 1098, 72 Sup. Ct. 777 (1952).

7 The New York censorship statute at that time provided: "The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto." 16 McKinney's Consolidated Laws of New York § 122 (1953).

8 236 U.S. 230, 59 L. Ed. 552, 35 Sup. Ct. 387 (1915).

9 250 Pa. 225, 95 Atl. 433 (1915).

10 Act of 19 June 1911, P. L. 1067, repealed by the Act of 15 May 1915, P. L. 534. Part of Section 2 of the 1911 Act which said it shall be the duty of the censorship board "to approve such as shall be moral and to withhold approval from such as shall tend to debase or corrupt the morals", and part of Section 6 which states that such board shall have the power to disapprove such motion pictures "which are sacrilegious, obscene, indecent or immoral or such as tend to corrupt morals" are in essence reenacted in Section 6 of the 1915 Act.

11 It is interesting to note that the court in Buffalo Branch, Mutual Film Corp. v. Breitinger, in support of its decision, cited the case of Mutual Film Corporation v. Industrial Commissioner of Ohio, which decision as previously noted has been expressly overruled by the Miracle Case.

12 See n. 2, supra.

13 265 Pa. 335, 108 Atl. 816 (1919).

morals".[14] *In Re The Ramparts We Watch*[15] the Censorship Board refused to approve a portion of a documentary film depicting the German conquest of Poland, and advanced as its only reason that such film "has a tendency to corrupt and debase morals".[16]

It is the opinion of this writer, however, that the case of *Buffalo Branch, Mutual Film Corp. v. Breitinger*[17] will be overruled and that the *Act of* 1915[18] will be declared unconstitutional. This opinion is based not only on the weight which must be given to the *Miracle Case* but upon an even more recent decision of the United States Supreme Court. In *Commercial Pictures Corp. v. Regents of University of State of New York,*[19] it reversed an order of the New York Board of Censors which had banned the film "La Ronde" because "it was immoral and would tend to corrupt morals". The Court relied upon the *Miracle Case*. In essence, the language used by the New York Board of Censors in rejecting the film "La Ronde" and that of the Pennsylvania Board of Censors in rejecting the film "She Should Have Said No" are, for all practical purposes, one and the same. The Pennsylvania Board rejected the film because it was "indecent and immoral and tends to debase and corrupt morals" and the New York Board of Regents rejected the film because "it was immoral and would tend to corrupt morals". The similarity in these cases is striking.

Even though the Pennsylvania movie censorship statute may be declared unconstitutional, the most interesting question raised by this case will remain unanswered. Is movie censorship unconstitutional per se?

In the *Miracle Case* the Supreme Court was not called upon to decide whether a state may or may not censor motion pictures under a clearly drawn statute. It limited its decision to holding that a film could not be banned on the basis that it was "sacrilegious". "Since the term sacrilegious is the sole standard under attack here, it is not necessary for us to decide whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films."[20] In the words of Justice Frankfurter, "That is a very different question from the one now before us."[21]

This question takes on considerable import when we stop to consider what might be the fate of any subsequent Pennsylvania statute enacted by the legislature in lieu of the present statute being declared unconstitutional. Will such a statute,

---

14 Ibid.
15 39 D & C 437 (1940).
16 Ibid.
17 See n. 13, supra.
18 See n. 2, supra.
19 346 U.S. 588, 98 L. Ed. 235, 74 Sup. Ct. 296 (1954).
20 See n. 6, supra.
21 Ibid.

more clearly drawn,[22] meet the constitutional requirement of definiteness, or will it be declared invalid on the ground that all censorship statutes are unconstitutional per se? The police power may be exercised to prevent the continued showing of any film which is contrary to the public welfare after its initial exhibition.[23] Can this police power, however, be extended to include prior censorship of all motion pictures? The question is not answered in the *Miracle Case.*

The *Miracle Case* was preceded in time by a series of Supreme Court decisions invalidating "previous" restraints upon the freedom of speech. In *Near v. Minnesota,*[24] a Minnesota statute authorizing the enjoining of a newspaper for publishing "malicious, scandalous and defamatory matter"[25] was held to constitute a "previous" restraint upon freedom of speech. In *Cantwell v. State of Connecticut,*[26] a "prior" restraint upon freedom of speech and religion was held to have been imposed by a Connecticut statute which prohibited solicitation of money or services for any religious, charitable or philanthropic cause without prior authority from the Secretary of the Public Welfare Council. In *Thomas v. Collins,*[27] a Texas statute which required a union organizer to obtain an organizer's card to solicit members was held to constitute a "previous" restraint upon one's right of free speech and free assembly. The doctrine was extended to include motion pictures in the *Miracle Case.*

In *Near v. Minnesota,* the Court stated, "The protection even as to previous restraint is not absolutely unlimited", and laid down certain exceptions thereto such as publications in time of war which would be a hindrance to the national effort, or obscene publications or publications inciting to acts of violence and overthrow by force of orderly government.[28] This still does not, however, answer the question as to what will happen when the constitutionality of a clearly drawn censorship statute is at stake which does not involve the possible exceptions laid down in *Near v. Minnesota.*

---

22 Such as the present New York statute enacted after the prior Censorship Act had been declared unconstitutional by the Miracle and La Ronde Cases. "1. For the purpose of section one hundred twenty-two of this chapter, the term 'immoral' and the phrase 'of such a character that its exhibition would tend to corrupt morals' shall denote a motion picture film or part thereof, the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior. 2. For the purpose of section one hundred twenty-two of this chapter, the term 'incite to crime' shall denote a motion picture the dominant purpose or effect of which is to suggest that the commission of criminal acts or contempt for law is profitable, desirable, acceptable, or respectable behavior; or which advocates or teaches the use of or the methods of use of, narcotics or habit-forming drugs." Added L. 1954, c. 620, eff. April 12, 1954, 16 McKinney's Consolidated Laws of New York § 122a.

23 President Judge Lewis in the Hallmark opinion stated: "The police power is broad in scope, and we believe that it may be invoked to put an end to the exposure of films that upon exhibition are proved to be clearly indecent, obscene, or such as tend to provoke rioting, etc." See n. 1, supra.

24 283 U.S. 697, 75 L. Ed. 1357, 51 Sup. Ct. 625 (1930).

25 Ibid.

26 310 U.S. 296, 84 L. Ed. 1213, 60 Sup. Ct. 900 (1940).

27 323 U.S. 516, 89 L. Ed. 430, 65 Sup. Ct. 315 (1944).

28 See n. 8, supra.

More recently and subsequent to the *Miracle Case,* Justice Douglas in *Commercial Pictures Corp. v. Regents of University of State of New York* stated:[29]

> "The First and Fourteenth Amendments say Congress and the States shall make no law which abridges the freedom of speech or of the press. In order to say 'no law' does not mean what it says but that 'no law' is qualified to mean 'some law' I cannot take that step. In this nation every writer, actor or producer no matter what medium of expression he should use should be free from the censor. The constitutional guarantee of freedom of speech and press prevents a state from establishing censorship of motion pictures."[30]

In *W. L. Gelling v. State of Texas,*[31] Justice Douglas again stated:

> "If a Board of Censors can tell the American people what is in their best interests to see or to read or to hear then thought is regimented, authority substituted for liberty and the great purpose of the First Amendment to keep uncontrolled the freedom of expression defeated."[32]

If Justice Douglas is expressing the opinion of the entire Court it would seem to indicate that not only will the Supreme Court declare unconstitutional movie censorship statutes which provide for banning "immoral" and "sacrilegious" films, but they will declare all such censorship unconstitutional per se.

John J. Shumaker
Member of the Middler Class

MUNICIPALITIES — ZONING — BOARD OF ADJUSTMENT — DISCRETION — VARIANCES

The recent case of *Ward v .Scott,*[1] decided by the New Jersey Supreme Court, is an important decision in zoning law. By comparison with an earlier decision in the same case,[2] it affords a local governing body with an example of what a resolution granting a zoning variance must contain; it reaffirms the older pronouncements that actions of a zoning board of adjustment will not be reversed on appeal "in the absence of an affirmative showing that it was manifestly in abuse of their discretionary authority"; it clarifies the distinction between subsections (c) and (d) of the statute granting power to a board of adjustment to either grant or recommend a variance to a zoning ordinance; and it provides, for the first time, a definite statement that reasons for granting a variance, though individually inadequate, may be considered in the aggregate as sufficient.

---

29 See n. 23, supra. Concurring opinion filed by Justice Douglas in which Justice Black agreed.
30 Ibid.
31 343 U.S. 960, 96 L. Ed. 1359, 72 Sup. Ct. 1002 (1952).
32 Ibid. Concurring opinion.

---

1 16 N.J. 16, 105 A.2d 851 (1954).
2 Ward v. Scott, 11 N.J. 117, 93 A.2d 385 (1952).

The Statute

The statute which the instant case interprets has been called "the most controversial of all the provisions of the state enabling zoning statute".[3] *New Jersey Revised Statutes* 40:55-39 provides as follows:

> "The board of adjustment shall have the power to: . . . (c). Where by reason of exceptional narrowness, shallowness of shape of a specific piece of property, or by reason of other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under the act would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the owner of such property, to *authorize,* upon an appeal relating to such property, a variance from such strict application so as to relieve such difficulties or hardship; provided, however, that no variance shall be granted under this paragraph to allow a structure or use in a district restricted against such structure or use. (d). *Recommend* in particular cases and for special reasons to the governing body of the municipality the granting of a variance to allow a structure or use in a district restricted against such structure or use. Whereupon the governing body or board of public works may, by resolution, approve or disapprove such recommendation. If such recommendation shall be approved by the governing body or board of public works then the administrative officer in charge of granting permits shall forthwith issue a permit for such structure or use.
>
> "No relief may be granted or action taken under the terms of this section unless such relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance."[4]

Background of Ward v. Scott

On June 19, 1950, the Town Council of Bloomfield granted a variance for a shopping center to Ligham Construction Company pursuant to a recommendation of the board of adjustment under R. S. 40:55-39 (d). That action was attacked in the Law Division of the New Jersey Superior Court but was sustained in an opinion which set forth the pertinent facts and that court's conclusion that the municipal bodies were justified "in finding special circumstances to warrant the granting of the variance requested, and that not to grant the variance would be an undue hardship". On appeal the Supreme Court held that R. S. 40:55-39 constitutionally vested authority in the governing body to grant variances, upon the recommendation of the board of adjustment, "in particular cases and for special reasons" in accordance with the explicit statutory terms and without reference to the hardship requirement in subsection (c) on variances which may be granted directly by the board of adjustment acting alone. They determined, however, that there were insufficient findings under subsection (d) and, accordingly, remanded

---

[3] Romano, Frank, Zoning and Planning Law in New Jersey, p. 165, (1953).

[4] As amended L. 1948, c. 305, p. 1223, § 6; L. 1949, c. 242, p. 779, § 1; L. 1953, c. 288, p. -, § 1.

the cause to the board for "reconsideration, findings and recommendation to the town council".[5]

On May 14, 1953, the board of adjustment again recommended the granting of the variance but this time its resolution set forth detailed findings and special reasons in support of its recommendations. On June 1, 1953, the town council approved the recommendation for the reasons expressed in the resolution of the board and "upon the understanding that the land would be developed in accordance with plans filed with the board and the building inspector".[6] Once again the matter was brought before the Law Division which, on October 30, 1953, sustained the council's action and dismissed the plaintiff's complaint. A comparison of the two resolutions will illustrate what must be included in a resolution to render it valid and what constitutes an insufficient resolution.

It is to be commented, of course, that the second resolution embodied in the instant case is not a "model" to be followed precisely. There was enough question in regard to its sufficiency for an appeal to be taken, as the earlier resolution, through the Law Division and to the Supreme Court. Also, the final decision met with a strong dissenting opinion by Justice Heher, concurred in by Chief Justice Vanderbilt.[7]

The importance of the second resolution, however, is to show that a resolution must be complete. The record of the hearing of the board of adjustment and the bases upon which the board makes its decision must be shown in the record, and it must be clear enough to show reasonableness and lack of capriciousness, as well as conformity to the statutory requirements.

Insufficient Reasons

Several of the ten reasons[8] set forth in the resolution had previously been considered insufficient, in themselves, to warrant the granting of a variance. Perhaps the primary example of this is found in reason number six, "That the adjacent commercial structures and uses render it *economically unsound* to develop the lands for residential purposes. . . ." In *Scaduto v. Bloomfield*,[9] it has been held, "It is not *per se* a sufficient reason for variation in zoning ordinance restrictions that nonconforming use is more profitable to the landowner." This principle was affirmed in *Beirn v. Morris*,[10] decided shortly before the instant case.

---

5 See n. 2, supra.
6 See n. 1, supra.
7 For those seeking to rely on the decision in this case, but who are wary of a strong dissent, part of the dissent, at least, was based upon the fact that the applicant who had owned a large tract of land "by plan of the whole . . . set apart a portion for the commercial enterprise in such way as to give it the semblance of a unique relation to the remainder". Justice Heher commented that "the owner may not so lay out his land as to provide the basis for a variance for irregularity of shape, and the like, and thus to defeat the general rule of the ordinance."
8 See n. 1, supra.
9 127 N.J.L. 1, 20 A.2d 649 (1941).
10 14 N.J. 529, 103 A.2d 361 (1954).

Nevertheless, despite these previous rulings, the instant court decided as follows:

> "In passing on this issue (whether in the light of the special reasons advanced and the supporting evidence, the variance may be deemed to have been granted arbitrarily, capriciously or unreasonably) we must look at the entire picture and consider the reasons in their aggregate; it is in nowise controlling that one or more of the reasons standing alone would not be legally sufficient."[11]

It must be noted, however, that the *Beirn v Morris* case,[12] and others cited for the principle that economic hardship is not per se a sufficient reason for variance, was an appeal under subsection (c) of a denial of an application by the board of adjustment. In that case the appellants were seeking to rebut a presumption of validity of the decision and to convince the appellate court that "economic hardship" should have been considered. In *Ward v. Scott,* the economic hardship was, in fact, one of the several factors considered in recommending the variance.

The conclusion, therefore, seems to be that where a variance has been requested on the ground of reasons which, separately, are insufficient and that request has been denied, the court will not normally reverse the local officials. Where the variance has been granted, however, even though partially because of reasons which in themselves may be insufficient, the grant will be upheld in the absence of arbitrary or capricious action, if, in the aggregate, the reasons indicate that the action of the officials was reasonable.

It may also be noted that the resolution includes "that the foregoing facts established by the evidence corroborates the conclusion of the Board upon personal inspection of the site. . . ." Where, as here, the members of the board have made a personal inspection and have used that in reaching their decision, such fact must appear in the record.[13]

Burden of Proof

As mentioned before, it is no longer a point of dispute that a party appealing a decision of a board of adjustment must rebut the presumption of validity for "the ultimate interests of effective zoning will be advanced by permitting the action of the municipal officials to stand, in the absence of an affirmative showing that it was manifestly in abuse of their discretionary authority". This is true whether the board of adjustment had granted[14] or denied the variance[15] or whether the decision has been based on subsection (c)[16] or subsection (d)[17] of R. S. 40:55-39.

---

11 See n. 1, supra.
12 See n. 10, supra.
13 Giordano v. Newark, 2 N.J. 45, 64 A.2d 462, affirmed 2 N.J. 585, 67 A.2d 454 (1949).
14 165 Augusta Street, Inc., v. Collins, 9 N.J. 259, 87 A.2d 889 (1952).
15 Rexon v. Board of Adjustment, Haddonfield, 10 N.J. 1, 89 A.2d 233 (1952).
16 See n. 15, supra.
17 Monmouth Lumber Co., v. Ocean Township, 9 N.J. 64, 87 A.2d 9 (1952).

The instant case seems to carry this idea a little further and to give advice to parties seeking to attack an action of a board of adjustment and/or local governing body. There are occasionally times when an appeal may be based upon grounds that the local decision was made in bad faith or because of fraud. The appellants, however, in the ordinary case are warned not to approach their appeal with an attitude of suspicion that local officials perform their duties in complete bad faith. It was stated in the *Ward* case, *supra*:

> "Local officials who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people are undoubtedly the best equipped to pass initially on such applications for variance. And their determinations should not be approached with a general feeling of suspicion, for as Justice Holmes has properly admonished: *'Universal distrust creates universal incompetence.'* "[18]

Subsections (c) and (d)

One of the difficulties which the appellate court has encountered in zoning cases under this statute is the difference in precedents under subsections (c) and (d). In the first *Ward v. Scott* case,[19] the Supreme Court, through Justice Jacobs, said:

> "In the Monmouth Lumber case Justice Burling reviews the history of R. S. 40:55-39, with particular reference to its recent extensive revision. . . . As he pointed out, subsection (c) provides that the board of adjustment may grant a variance where, by reason of the extraordinary situation or condition of the property, the strict application of the zoning restrictions would result in 'peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the owner'; in contrast, however, subsection (d) omits the specific requirement for a showing of practical difficulties or undue hardship and provides that 'in particular cases and for special reasons' the board of adjustment may recommend to the governing body of the municipality that a variance be granted. Unlike subsection (c), action taken by the board of adjustment under subsection (d) is subject to approval or disapproval by the municipality, and no variance 'can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance'."[20]

After the decision was rendered in the first *Ward v. Scott* case, R. S. 40:55-39 was amended by the legislature. Although it sharply restricted subsection (c) so as to prohibit the board itself from granting any variance which allows a structure or use in a district restricted against such structure or use, it "deliberately continued subsection (d) without alteration" so as to permit the board "in particular cases and for special reasons"[21] to recommend for action by the governing body a variance which allows a structure or use in a district restricted against such use.

---

18 See n. 1, supra.
19 See n. 2, supra.
20 Citing Leiman v. Board of Adjustment, Cranford Twp., 9 N.J. 336 (1952); Gerkin v. Village of Ridgewood, 17 N.J. Super. 472 (1952).
21 See n. 2, supra.

It is important to distinguish the subsections, not only in regard to the granting or recommending of a variance, but also in presentation of an appeal based on either subsection. It is obvious that a decision based on subsection (c) will not carry the weight of a precedent based on subsection (d) when the appeal is based on the latter subsection, as the following statement of Justice Jacobs clearly shows:

> ". . . . Nor are we particularly concerned with precedents under subsection (c) which contain restrictions not embodied in subsection (d) Cf. Beirn vs. Morris, supra."[22]

Reasons for Clarity in Making Decision on Local Level

Under the new proceedings in lieu of the prerogative writ of certiorari it is possible for a board of adjustment to face litigation no matter how they should decide on an application for a variance, and, indeed, from the amount of zoning litigation now on court dockets, it appears that that is the case. If the decision is to grant a variance, any citizen in the area of the subject property may bring an action to have the variance set aside, whereas, if the application is denied, the applicant has the right of review by the courts. As noted above, the appellant has to face the presumption of validity of the decision. Strict conformance with procedural rules and a carefully worded resolution, however, will do much to discourage litigation following a decision by a board of adjustment.

Although in an action denying a variance the courts do not require the reasons to be set forth, nevertheless, it would seem advisable for the board to set forth their reasons for denial so as to discourage appeal by an applicant who then, besides having to rebut the presumption of reasonable action, would have to rebut a strong and complete record. Likewise, if the record, in cases where a variance has been granted, shows clear and sufficient reasons for the action, complaining neighbors (and their attorney who is bound to proceed only on a good cause of action) will be less likely to bring an action.

The two cases of *Ward v. Scott* include another reason for a complete record in cases where the application is granted. As noted, the original resolution was insufficient and the cause was remanded to the board for "reconsideration, findings and recommendation to the town council". Thus, the board of adjustment and town council not only spent time in considering the original request and in defending their action up through the Supreme Court, but they also found themselves back reconsidering the application de novo.[23] Then, following their second decision, the action was defended, again through the Supreme Court. This is an expensive and time-consuming procedure and should give an incentive to any

---

22 See n. 1, supra.

23 Bernard Schwartz, writing in 1953 Annual Survey of American Law, published by New York University School of Law, comments on a similar case: "There would certainly appear to be a better way of handling these cases, which, at best, take an unconscionably long time, than by marching them twice through the agencies and the courts. Truly, as Mr. Justice Frankfurter himself aptly expressed it, 'this danger if not likelihood of thus marching the king's men up the hill and then marching them down again seems to me a mode of judicial administration to which I cannot yield concurrence.' (dissenting in City of Yonkers v. United States, 320 U.S. 685, 694 (1944)."

board of adjustment to make certain that whatever they decide is not only legally sufficient, but also that the record is so complete and certain as to discourage litigation.

Comparison with Pennsylvania Zoning Law

The New Jersey statute is uncommon in setting one standard by which a zoning board may grant a variance and another whereby the board may recommend a variance to the local governing body. In Pennsylvania, separate statutes regulate the several classes of municipalities. An example is found in the statute regulating activities of a zoning board in a city of the first class:

> "Board of Adjustment shall have the following powers: . . . 3. To authorize, upon appeal, in specific cases, such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done."[24]

From the above statute several terms appear similiar to those found in *New Jersey Revised Statutes* 40:55-39, for example, "in specific cases", "special conditions", "unnecessary hardship" and the provision that the variance not be contrary to the spirit of the ordinance.

The burden of proof is substantially the same on appeal. The Pennsylvania Supreme Court has held:

> "The granting of variance under zoning code lies within discretionary power of Board of Adjustment and this court will not set aside Board's decision in the absence of abuse of that discretion."[25]

In regard to the problem that there be sufficient reasons for granting a variance the case of *Ventresca v. Exley*[26] held as follows:

> "Accordingly it has been consistently held that the authority of the Board of Adjustment is not an arbitrary one and that it may grant a variance only if an alleged hardship is 'substantial and of compelling force' . . . and only where the hardship is unnecessary and the interests of the owners and occupants of the neighboring properties are protected."

As pointed out above[27] the problem of "remanding for reconsideration" is frequent in all jurisdictions, and this is true in the courts of Pennsylvania, no less than New Jersey or the United States Supreme Court. Consequently, a complete record showing careful consideration and based upon legally sufficient reasons should be the goal of each local board of adjustment.

Harman R. Clark, Jr.
Member of the Middler Class

---

24 Act of May 6, 1929, P. L. 1551, § 8, 53 P.S. 3829.
25 Phillips v. Griffiths, 366 Pa. 468, 77 A.2d 375 (1951).
26 358 Pa. 98, 56 A.2d 210 (1948).
27 See n. 23, supra.

CRIMINAL LAW — HOMICIDE — FELONY MURDER COMMITTED IN PERPETRATION OF ARSON — PROXIMATE CAUSE — DEATH OF ACCOMPLICE

In the recent case of *Commonwealth v. Bolish,*[1] the Lackawanna County Court held the defendant, D1, guilty for the murder of his co-conspirator, D2, during the commission of an arson.

The Jury found the facts to be as follows: D1 and D2 conspired to commit arson. D1 was not present at the scene of the felony, but while D2 was setting the fire some combustible material exploded killing D2.

The Commonwealth presented its case on the theory that the death of D2 was a felony-murder, the death occurring as a result of arson, in the commission of which felony D1 was one of the principals. At the end of the Commonwealth's case, D1 demurred to the evidence, and the demurrer being overruled by the trial judge, D1 rested without presenting any evidence and without taking the stand himself.

D1 then presented a motion in arrest of judgment and a motion for a new trial based on two theories, namely, (1) that the conviction should not be allowed to stand since the evidence was purely circumstantial and (2) that under any view of the facts, the victim, D2, must be regarded as an accomplice of the perpetrator of the arson and accidentally caused his own death and that under such circumstances the theory of felony-murder should not apply.

There have been two cases in which similar factual situations have arisen. In *People v. Ferlin*[2], D1 hired D2 to burn a building, and in doing so, D2 was killed. The court held D1 innocent of the murder charge. According to the *California Penal Code*[3] murder is "the unlawful killing of a human being with malice aforethought". The court reasoned that the deceased could not be guilty of his own murder and, therefore, neither could his confederate. The court stated as follows:

> "It would not be seriously contended that one accidentally killing himself while engaged in the commission of a felony was guilty of murder. If the defendant herein is guilty of murder because of the accidental killing of his co-conspirator, then it must follow that Skola (D2) was also guilty of murder, and, if he had recovered from his burns that he would have been guilty of an attempt to commit murder. . . . It cannot be said from the instant case that D1 had a common design that the deceased should accidentally kill himself".

In *People v. LaBarbera,*[4] the defendant, D1, hired his co-conspirator, D2 to burn a building, during the commission of which arson D2 was killed when an explosion occurred in the house. The court acquitted D1 on the basis of the wording of the New York statute defining homicide as "the killing of one human being by an act, procurement, or omission of another".[5] The killing of D2 occurred

---

1 55 Lack. Jur. 213 (1954).
2 203 Cal. 587, 265 Pac. 230 (1928).
3 California Penal Code, § 187.
4 287 N. Y. Supp. 257 (1936).
5 New York Penal Law, § 1042.

by his own act and, therefore, was not the act of another. Since D2's death did not come within the definition of criminal homicide, D1 was acquitted.

These two cases are the only cases in point where D2 kills D2, and they illustrate that the law has never held D1 guilty where D2 kills D2.

Why then, did the Lackawanna County Court hold D1 guilty? The majority of the court reasoned that the basis of felony-murder in Pennsylvania is the theory of proximate cause and, therefore, these two decisions are not applicable since they were not decided on the question of causation.

The author disagrees with this reasoning on two grounds, namely, (1) that malice, not proximate cause, is the underlying theory of felony-murder and that proximate cause is merely a limitation imposed on the felony-murder doctrine, and (2) that in any event, the felony-murder doctrine should not apply to the situation where D2 kills D2 and that the Pennsylvania court erred in not following the precedent set by the California and New York courts.

As to point one, Judge Robinson, in his dissenting opinion said:

> "The majority hold that the 'theory of proximate cause is the basis of felony murder in Pennsylvania,' a statement of law, which in its broad sense, is not strictly correct. Causation is a factor applicable to murder as well as other criminal cases but the basis of liability for felony murder is the law of murder itself. Causation explains the results reached in certain classes of cases but it does not determine basic liability; its true purpose in the law is to define the extent of responsibility for the consequences of an unlawful act."

In other words, Judge Robinson believes that in order to apply this doctrine, we must adhere to the law of murder, which requires that the defendant have malice in order to be guilty of murder.[6] Where do we get this malice? At common law, murder was defined as "unlawful homicide with malice aforethought".[7] Malice aforethought included:

(1) intent to kill,

(2) intent to inflict great bodily harm,

(3) intent to do an act with knowledge that it is likely to cause death or great bodily harm,

(4) intent to commit a felony,

(5) intent to oppose any officer of justice in discharging certain of his duties.[8]

How did this fourth class of malice arise? At common law, the punishment of other felonies and murder was the same—death.[9] If during the commission of a felony a homicide occurred, the law did not concern itself with the defendant's malice in regard to the murder, since the defendant would be hanged for com-

---

6 Commonwealth v. Guida, 341 Pa. 305, 19 A.2d 98 (1941).
7 Regina v. Serne, 16 Cox C. C. 311 (1887).
8 3 Stephen, History of the Criminal Law of England 22 (1833).
9 4 Blackstone's Commentaries § 98 (1499).

mitting the felony. Later, the punishment for felony was modified.[10] Homicides were being committed in which no express malice was present and none could be inferred. Consequently, the need arose for a concept of malice, necessary to convict the defendant of murder, so that malice could be deemed to exist as a matter of law in cases where express malice was not present yet where the killer deserved to be punished for murder.[11] In *Mansell and Herbert's Case,*[12] several men were convicted of murder for the killing of a bystander while they were attempting a robbery. This is the beginning of what later became known as the felony-murder doctrine.

The common law rule was that if a person killed another in doing or attempting to do another act and the act done or attempted to be done was a felony, the killing was murder. There was thus supplied the state of mind called malice which was essential to constitute murder. The malice of the initial offense attaches to whatever else the criminal may do in connection therewith.[13]

An analogous doctrine is incorporated in the laws of Pennsylvania by the statute which provides that "all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree."[14]

The felony-murder doctrine is not one of limitless application. At first, it was confined to robbery cases.[15] Coke states a broad rule that a killing during the commission of any unlawful act constitutes murder. Coke's rule was later modified so as to apply only in cases of felonies.[16] In *Regina v. Woodburne,*[17] the court stated by way of dictum that it would be murder if a man shot at a fowl and accidentally killed a man, if he intended to steal the fowl since the stealing of the fowl was considered a felony. This illustrates that the felony-murder rule, even with this limitation, was still too harsh.

Justice Stephen, in *Regina v. Serne,*[18] placed a further limitation upon this rule when he declared:

> "Instead of saying that any act done with intent to commit a felony which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death done for the purpose of committing a felony which causes death, should be murder."

---

10 1 Bishop's Criminal Law 447.
11 34 Ky. L. J. 160 (1946).
12 1 Dyer 128b, 73 Eng. Rep. 279 (1555).
13 See n. 6, supra.
14 Act of June 24, 1839, P. L. 872, § 701.
15 3 Coke, Third Institutes 52 (1680).
16 Rex v. Plummer, 84 Eng. Rep. 1103 (1701).
17 16 St. Tr. 53 (1722).
18 See n. 7, supra.

Further limitations were imposed on the application of the felony-murder doctrine. Among these are:

(1) By restricting it to felonies which are mala in se.[19]

(2) By restricting it to dangerous felonies.[20]

(3) By restricting it to felonies of violence.[21]

(4) By restricting it to specifically enumerated felonies.[22]

(5) By requiring that the homicide be the proximate result or probable consequence of the felonious act.[23]

(6) By contracting the period during which the felony can be said to be in the course of being committed.[24]

So we can see, that at its inception, the felony-murder doctrine was applied so as to supply the element of malice necessary to convict the felon of murder, and as it grew, limitations were placed upon it, restricting it to certain conditions.

The majority of the court in the *Bolish* case holds that the theory of proximate cause is the basis of the felony-murder doctrine. It is this writer's contention that the court is confusing the basis of the felony-murder doctrine with the limitations imposed on it. In the case of *Commonwealth v. Almeida*[25] which the Lackawanna court quotes, Mr. Chief Justice Maxey said, "A knave who feloniously and maliciously starts a 'chain of reaction' of acts dangerous to human life must be held responsible for the natural fatal results of his acts." The Lackawanna court says the application of the theory of proximate cause is the basis of the doctrine of felony-murder in Pennsylvania. It is this writer's contention that this is error. The court, in the *Almeida* case, was not setting up the proximate cause theory as a basis of the felony-murder doctrine. It was saying that if the act of the defendant was not the proximate cause of the homicide, then the defendant was not guilty. This is a limitation on the felony-murder doctrine.

In the case of *Commonwealth v. Kelly*,[26] which the majority of the Lackawanna court holds in support of its contention, the court says, "*Malice* is the mainspring of his (D's) outlawed enterprise and his every act within the latter's ambit is imputable to that base quality. Such a rule is essential to the protection of human life." Does not this seem to indicate that the basis of the felony-murder doctrine is to supply the element of malice? The author believes it does. The court goes on to say, "In order for a homicide which is committed in the perpetration or

---

19 People v. Pavlic, 227 Mich. 562, 199 N. W. 373, 35 A. L. R. 741 (1924).
20 See n.'s 7 and 19, supra.
21 Director of Prosecutions v. Beard, A.C. 479 (1920); Rex v. Elnick, 33 Can.C.C. 174; 53 Dick. L. Rev. 298 (1920).
22 See n. 14, supra.
23 State v. Opher, 28 Del. 93, 188 Atl. 257 (1936); State v. Glover, 330 Mo. 209, 50 S. W.2d 1049, 87 A. L. R. 400 (1932); Regina v. Horsey, 3 F. & F. 287; Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949).
24 People v. Marwig, 227 N. Y. 382, 125 N. E. 535, 22 A. L. R. 845 (1919).
25 See n. 23, supra.
26 333 Pa. 280, 4 A.2d 805 (1939).

attempted perpetration of any of the enumerated felonies, to be adjudged murder in the first degree, there must be no break in the chain of events and the homicidal act must be connected with the maliciously motivated offense." The break in the chain of events seems to be a limitation on the felony-murder doctrine. In other words, if there is a break in the chain of events, the doctrine does not apply.

The Lackawanna court also quotes *Commonwealth v. Moyer*[27] in support of its contention. The court in the *Moyer* case said, "Where malice is the mainspring of a criminal act, the actor will be held responsible for the consequences of his act though it was not the one intended." In discussion of the Pennsylvania statute, that court said tht murder was used rather than homicide for the reason that a killer in the malicious perpetration of one of the specified felonies has committed common law murder. "The felon obviously possesses that 'wickedness of disposition, hardness of heart, cruelty and recklessness of consequences and a mind regardless of social duty' which constitutes *malice*." The court is concerned with malice, and it is this writer's contention that it meant that this transfer of intent to supply malice is the real basis of the felony-murder doctrine.

Therefore, it is this writer's contention that the reasoning of the Lackawanna court in holding that proximate cause is the basis of the felony-murder doctrine is error, since malice is the basis of the felony-murder doctrine. Proximate cause is merely a limitation upon the doctrine.

As to point two, it is the author's contention that the felony-murder doctrine does not apply where D2 kills D2. Judge Robinson poses some good questions in support of this point. Can the dead felon be guilty of his own murder? Why protect the lives of the felon and the law abiding alike? Why exact the life of this surviving felon if the deceased co-felon can not be punished?

The felony-murder rule serves as a deterrent against felonious invasions of the citizenry by outlaws and thereby affords protection to the lives and property of the peaceful members of the community. When in the course of a felony, a felon is killed by his own act, that reasoning is untenable. The law seeks to prevent recurrence of affirmative acts by using fear of punishment as a deterrent. The composition of capital punishment in a case where its deterrent value is negligible can only be explained as revenge, a motive few courts would attempt to justify.

In the case of *Commonwealth v. Moore*,[28] the court said that if the victim of the felony killed D2, D1 would not be guilty of murder. This would be an extreme extension of the felony-murder doctrine, and it exposes the unsoundness of the position of the Commonwealth. In this case, if D1 is not guilty when the victim kills D2, why should D1 be guilty when D2 kills D2? He should not be. The felony-murder doctrine should not apply in this instance.

---

27 357 Pa. 181, 53 A.2d 736 (1947).
28 121 Ky. 97, 88 S. W. 1085 (1905).

Therefore, since the felony-murder doctrine was meant to protect the peace loving citizens and to act as a deterrent factor, in the case where D2 kills D2 punishment of D1 will not satisfy these purposes and the felony-murder doctrine should not apply. As Judge Robinson states it, "The critical question of fact under the principles here expressed is: which one of the felons set off the fire, or otherwise stated, whose act killed Flynn (D2)?"

It will be interesting to note whether the Supreme Court of Pennsylvania will allow this decision to stand, and thus broaden the scope of the felony-murder doctrine, or will reverse the Lackawanna County Court's decision, thus placing a further limitation on the felony-murder doctrine in Pennsylvania.

Sandor Yelen
Member of the Middler Class